

TIMOTHY PAINTER
Claimant

MCELHANEY FENCE CO.
Respondent

CINCINNATI INSURANCE GROUP
Insurance Carrier

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

In this post award matter the ALJ found that the claimant was permanently and totally disabled as of March 12, 2003. The ALJ's Review and Modification Order indicated this was the date claimant filed her application for Review and Modification. This is inaccurate. The Board issued its opinion from the appeal of the original Award on March 12, 2003. Thereafter, claimant filed his application for Review and Modification on September 26, 2006. Pursuant to K.S.A. 44-528, the effective date of any modification cannot be more than 6 months before the date of the application.

The respondent requests review of the ALJ's conclusion and asserts that claimant's physical condition has not changed since the original Award. Alternatively, respondent contends that to the extent claimant's condition has changed, it is due to an intervening (and noncompensable) event. And in either instance, respondent maintains claimant has failed to prove that he is permanently and totally disabled as he retains the physical capacity to work. Respondent argues that at most, claimant has sustained a 2 percent increase of the functional impairment in his low back.

Claimant argues that his condition has deteriorated since his original Award, as evidenced by the fact that his physicians have diagnosed Reflex Sympathy Dystrophy (RSD), increased his pain medications and his work capacity classification has been lowered to account for the increase in his low back pain complaints. Claimant also contends that his subsequent compression fractures have occurred as a result of his original accident and the resulting osteopenia. Thus, any treatment and increase in impairment is attributable to his accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Award of the Administrative Law Judge sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is therefore not necessary to repeat those findings and conclusions herein. Except as to the effective date of this modification of the Award, the Board adopts those findings and conclusions of the ALJ as its own.

Claimant sustained a significant injury to his ankle and foot as well as his wrist and a fractured coccyx in April 2000. Claimant's original Award granted him a 23 percent permanent partial impairment to the whole body as a result of his left foot and low back

injuries.¹ In addition, there was a finding that he had sustained a 24 percent wage loss (based upon an imputed wage of \$8.78 per hour) and a 52 percent task loss, which yields a 38 percent work disability. At that point in his claim, claimant was assigned to a medium category of work (although he was not working and based upon the Board's analysis, had not made a good faith search to find post-injury employment).

Since that Award was entered, claimant has not returned to work, but has continued to receive medical treatment by the authorized treating physicians and has undergone a variety of evaluations, at the request of both lawyers and pursuant to court order. Claimant saw Dr. Friesen beginning in November 2002 for pain management and was eventually diagnosed with RSD in his left leg. He has undergone a period of physical therapy and the medical records and his testimony make it clear he was experiencing ongoing pain complaints in his left foot, but more particularly in his low back. And these complaints were, over time, increasing and causing him to need additional pain medications, including among other things, Oxycontin.

On February 18, 2004, claimant was seen by Dr. Hendler at respondent's direction. Dr. Hendler identified claimant's medications (including Oxycontin) and his foot and back complaints. Over the course of claimant's treatment, Dr. Hendler was continually attempting to adjust claimant's medications for maximum positive effect. While he concedes that he did not see any evidence of radiculopathy, he acknowledged that Dr. Chandra, another physician who had seen claimant, had previously diagnosed radiculopathy.

On February 28, 2004, claimant was walking outdoors and bent down to pick up a fragment of a concrete cinder block weighing between 2-4 pounds. He immediately felt pain in his back and sought treatment at the local emergency room. He was diagnosed with a compression fracture at L4 and given a pain shot and released. According to the claimant, his pain and overall condition returned fairly quickly to the same level as before this incident. It later came to light that claimant is presently suffering from a condition known as osteopenia, a thinning of the bones, which led to the compression fracture. It is the general consensus of the physicians that this condition was found within his leg and spine and possibly within his entire body and leaves him at risk for further bone fractures. Dr. Koprivica testified that osteopenia can be caused by inactivity and it is his opinion that claimant's osteopenia was a natural and probable result of claimant's inactivity following his April 2000 accident. He further testified that this event did not increase claimant's functional impairment. Conversely, Dr. MacMillan contends that the accident could not have caused the osteopenia because the condition exists in claimant's entire body and not just his lower leg, the appendage that was immediately injured in the original accident.

¹ Board Order, 2003 WL 1918548 (Kan. WCAB Mar. 12, 2003). This order was from claimant's appeal of the ALJ's July 9, 2002 and July 25, 2002 Awards.

Thus, it is Dr. MacMillan's opinion that the compression fracture was an unrelated and nonvocational accident.

Dr. Hendler was not made aware of this accident and the resulting compression fracture until his deposition taken in connection with these post-award proceedings. Nonetheless, Dr. Hendler testified that claimant's diagnoses did not change after February 28, 2004 and his symptoms remained static until 2006, at which point his condition began to deteriorate. Presently, claimant has severe left hip pain, daily low back pain, he cannot stand longer than 15 minutes and cannot sit longer than 60 minutes. He is unable to walk more than 80-200 feet.

Claimant now has pain in the right lower extremity and continues to suffer from swelling in his left ankle along with an altered gate as a result of the orthotic device he must wear in order to stabilize his left ankle. Dr. Koprivica identified a 2 centimeter (cm) difference in claimant's left calf when compared to his right, attributable to the atrophy resulting from his April 2000 injury. Strangely, Dr. MacMillan, who examined claimant within weeks of Dr. Koprivica, first indicated that claimant had no such atrophy. But when confronted with Dr. Koprivica's 2 cm finding, Dr. MacMillan testified that he would have expected some atrophy and is not surprised by Dr. Koprivica's finding.

One vocational expert testified that claimant is capable of working under the restrictions imposed by Dr. MacMillan and Dr. Hendler but not under those imposed by Dr. Bieri. Dr. Bieri testified that claimant was essentially unemployable because of his orthotic device and the narcotics he is now prescribed. Likewise, Dr. Koprivica testified that claimant was realistically unemployable due to his medications and his need to make postural changes throughout the day. Michael Dreiling, a vocational expert indicated that claimant was not realistically employable given his limited education, intelligence and the lack of computer or office skills. Claimant attempted but failed vocational retraining classes. He even attempted to help out at a family business but was unable to make change or work a cash register, most likely due to the level of medications he was taking and continues to take.

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. The Workers Compensation Act provides, in part:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and

if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, be increasing or diminishing the compensation subject to the limitation provided in the workers compensation act.²

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.³ If there is a change in the claimant's work disability, then the award is subject to review and modification.⁴

In a review and modification proceeding premised upon a change of circumstances, the burden of establishing the changed conditions is on the party asserting them.⁵ A change in claimant's physical or employment status will to justify modification of an award.⁶

Here, claimant asserts that he became permanently and totally disabled since his original Award was entered. K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

Here claimant suffered an injury to his left wrist and his left lower extremity along with a fracture to his coccyx. Thus, his injury raises a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2). Independent of that argument, claimant also sustained a low back injury in his original accident (which constitutes a whole body impairment) and to the extent he has sustained a worsening of that condition he is entitled

² K.S.A. 44-528.

³ *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

⁴ *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

⁵ *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

⁶ See, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

to review and modification for consideration of his allegation of permanent total disability status.

After considering this evidence, the Board concludes that the ALJ's Review and Modification Order should be affirmed, with the exception of the effective date. Like the ALJ, the Board is persuaded that claimant's low back condition was progressively deteriorating following his original Award. It appears that claimant was also diagnosed with RSD in his left lower leg but it is unclear whether this has impacted his percentage of functional impairment or his work restrictions (or ability to perform job tasks. His functional work status has decreased from medium to sedentary work. His need for medications, including Oxycontin, has increased and he is suffering from atrophy in his left calf. Claimant has always performed physical labor and has little or no remaining skills and of those that he has, they are somewhat impaired by his medications.

The Board also finds that the osteopenia is the natural and probable result of his accident as well. Although Dr. MacMillan stridently denies the connection between the condition and claimant's accident, the Board does not accept this denial. Claimant was not diagnosed with osteopenia until after his accident and since his accident his overall activity level has been drastically decreased, particularly in light of his pre-injury activities as a fence builder. It is reasonable to conclude that given his minimal activities since 2000 his osteopenia would exist in other areas of his body other than just his lower extremity.

Independent of the finding above, the Board also finds that respondent has failed to rebut the presumption of permanent total disability status under these facts. Claimant had a history of physical work and at present, is at best able to perform sedentary work. He is on a great deal of medications which everyone agrees he requires, and his attention span and ability to concentrate is significantly compromised. It is uncontroverted that he was not able to use a cash register and make change. He failed his vocational classes. He is unable to use a computer without assistance and has few pre-injury skills that would translate to meaningful employment. The physicians who maintain that he can continue to work take the unusual position that these medications are not a vocational barrier. The Board is not so persuaded. Claimant is presumptively permanently and totally disabled and that presumption was not rebutted.

Accordingly, the ALJ's Review and Modification Order is affirmed although the effective date of this modification is March 30, 2006, a date that is 6 months before September 26, 2006, the date of claimant's Application for Review and Modification.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 15, 2007, is modified to reflect the effective date of this modification finding claimant permanently and totally disabled as of March 30, 2006.

As of January 23, 2008, the calculation should read as follows less amounts previously paid:

The claimant is entitled to 48.00 weeks temporary total disability compensation at the rate of \$309.60 per week or \$14,860.80 followed by permanent total disability compensation at the rate of \$309.60 per week not to exceed \$125,000.00 for a permanent total general body disability.

As of March 30, 2006 there would be due and owing to the claimant 48.00 weeks of temporary total disability compensation at the rate of \$309.60 per week in the sum of \$14,860.80 plus 262.43 weeks of permanent total disability compensation at the rate of \$309.60 per week in the sum of \$81,248.33 for a total due and owing of \$96,109.13, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$28,890.87 shall be paid at \$309.60 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of January, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant
Jennifer Arnett, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge